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July 19, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: PR Docket No. 93-144

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bell Atlantic Enterprises International, Inc. are an original and four copies of its "Comments" in the above-referenced rulemaking proceeding.

Should there be any questions with regard to these comments, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

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JUL 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems In the 800 MHz Frequency Band	)	PR Docket No. 93-144

COMMENTS OF BELL ATLANTIC ENTERPRISES INTERNATIONAL, INC.

Bell Atlantic Enterprises International, Inc., (BAEI),[1/] by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits these comments in the above-referenced rulemaking.

BAEI is concerned that the Commission, in proposing major changes for the SMR service, did not address the eligibility of wireline telephone carriers to hold SMR licenses. Section 90.603(c) of the Commission's Rules currently prohibits wireline carrier ownership of SMR systems. In 1986, the Commission proposed to eliminate Section 90.603(c), but that rulemaking is still not finally resolved. Now, while that proceeding languishes, the Commission has proposed fundamental changes in the Part 90 Rules

of the SMR service. Accordingly, the Commission should complete the 1986 proceeding forthwith and affirm its prior view that wireline carriers are eligible to hold SMR licenses, before taking up the eligibility and other issues raised by this new rulemaking.

I. DISCUSSION

Section 90.603(c) of the Commission's Rules now prohibits a wireline carrier from holding an SMR license in any market. It was the Commission itself which proposed to repeal the rule more

decision.[4/] These petitions have been awaiting action for almost a year.

Rather than finally resolve PR Docket No. 86-3 before initiating this and other new rulemakings affecting the SMR service, the Commission has left that seven-year old proceeding hanging. This approach is misguided for several reasons.

First, the orderly conduct of the Commission's business, and its ability to make reasoned and logical decisions, requires that it dispose of matters before it on a timely basis, before taking up related new matters. It makes little sense to separate the disposition of the wireline/SMR ownership issue from the broad eligibility issues on which the Commission is moving ahead in this new docket.

Second, it is fundamentally unfair to parties who have a long-standing interest in modifying the rules for a radio service to leave their petitions unresolved, while at the same time responding to other parties who more recently sought changes in the rules for the same service. This is particularly true when one of the key issues in the new rulemaking is eligibility to hold an SMR license, the same issue presented in the seven-year-old rulemaking.[5/]

4/ Because it is directly relevant to the eligibility issues

Third, the Commission states that the principal objective of the new rules is to encourage more efficient and expanded SMR service. Notice at ¶¶ 1, 9. The Commission previously found, however, that repeal of Section 90.603(c) would promote the same goals of expanded and efficient service. The goal of the new SMR rulemaking could thus be undermined by leaving Section 90.603(c) intact.

II. CONCLUSION

The Commission should immediately act on the long-pending petitions for reconsideration in PR Docket 86-3 and either repeal or modify Section 90.603(c), as it originally proposed. It should defer the issues raised in this new proceeding as to eligibility for wide-area SMR licenses until the question as to wireline carrier eligibility to hold licenses is finally resolved.

Respectfully submitted,

BELL ATLANTIC ENTERPRISES
INTERNATIONAL, INC.

By: John T. Scott, III

John T. Scott, III
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Its Attorneys

Dated: July 19, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules Governing Eligibility for the Specialized Mobile Radio Services in the 800 MHz Land Mobile Band	)	PR Docket No. 86-3

PETITION FOR RECONSIDERATION

Bell Atlantic Enterprises International, Inc. ("BAEI"),[1/] by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider its July 15, 1992 Order terminating the above-referenced rulemaking.[2/]

I. SUMMARY

In this proceeding, the Commission initially proposed to repeal a rule which it conceded had been adopted without explanation and had no continuing rationale. Rather than terminate the rule, however, the Commission instead terminated the rulemaking, and kept the rule on its books. The Order is unlawful on two grounds. First, the Commission left intact a rule without

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1/ BAEI is a subsidiary of Bell Atlantic Corporation. It holds temporary waivers to operate four SMR systems in the Southwest, conditional on the outcome of this rulemaking.

2/ A summary of the Order was published in the Federal Register on July 22, 1992. Under Sections 1.4 and 1.429 of the Commission's Rules, therefore, petitions for reconsideration are due on or before August 21, 1992.

supplying any basis for it. It then compounded its error by simultaneously conceding that the record was not an adequate basis for any conclusions but nevertheless making speculative findings with regard to competition in the SMR industry. Second, the Order violated settled principles of administrative law because the Commission failed to provide adequate grounds for terminating the proceeding. BAEI thus asks that the Commission either eliminate Section 90.603(c), or reopen the rulemaking for additional comment and preserve existing waivers until the rulemaking is concluded.

II. HISTORY OF THE PROCEEDING

In 1986, the Commission issued its Notice of Proposed Rule Making ("Notice")[3/] in PR Docket No. 86-3. The Notice proposed to eliminate Section 90.603(c) of the Commission's Rules, which prohibits wireline telephone common carriers from holding SMR base station licenses. Section 90.603(c) had been promulgated in 1974 as part of the general rulemaking establishing the SMR service.[4/] That rulemaking, however, did not discuss this new section, let alone provide any rationale for it.

The Commission found that none of the possible bases for Section 90.603(c) continued to exist. To the extent the rule had been based on spectrum allocation and private vs. common carrier

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3/ PR Docket No. 86-3, 51 Fed. Reg. 2910 (January 22, 1986).

4/ Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974), recon. Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), aff'd sub nom. National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("Second Report and Order").

considerations, those considerations had been disposed of by other rulemakings and legislation. Notice at ¶ 5. To the extent it had been based on competitive concerns, the Commission expressly concluded that repealing the rule would in fact increase competition. Permitting wireline entry into the SMR market "would provide more efficient service to the public by enhancing competition." Notice at ¶ 6. Thus it stated, "We propose to eliminate the prohibition on the licensing of wireline common carriers." Notice at ¶ 5.

The single issue on which the Commission requested comment was whether wireline common carriers should be permitted to offer SMR service in the same markets where they provide telephone service. The Commission did not discuss or ask for comments on permitting wirelines to hold SMR licenses outside their telephone service areas.

On February 3, 1992, while the rulemaking was pending, the Commission granted BAEI a waiver of Section 90.603(c) to acquire four SMR systems in the Southwest: WQA-568 (Mesa, Arizona); KNDC-480 (Phoenix, Arizona); KNGD-854 (Tucson, Arizona); and

merely permitted parties holding existing waivers to submit a request for a permanent waiver demonstrating how "the public interest will be served by the continuation of waiver status." Order at ¶ 5. While BAEI intends to seek a permanent waiver, it submits this Petition because the Commission's Order failed to justify retaining Section 90.603(c) at all. When a rule has, as here, lost whatever initial validity it may have had, the proper course is not to retain the rule and consider waivers, but to repeal the rule itself.

III. THE ORDER UNLAWFULLY PRESERVES A RULE THAT THE COMMISSION HAS CONCEDED LACKS CONTINUING VALIDITY.

The Order is arbitrary and capricious because it leaves in place a rule that the Commission itself has admitted is no longer warranted. There is no express justification anywhere in the record of PR Docket No. 86-3 or the original 1974 proceeding for Section 90.603(c). As the Commission admits, "The origin of the wireline limitation was not explicitly discussed in either Docket No. 18262 or any subsequent proceeding." Order at ¶ 2.

The Commission itself acknowledges that it can only "infer several likely bases" for the initial restriction. Id. But an agency's rules cannot be based on mere inference; they require a rational, record basis which is conspicuously absent here. Moreover, the Commission fails to demonstrate why any of these original inferred reasons for the rule have any relevance today. In fact, as the Commission said in the Notice beginning this rulemaking, those reasons no longer apply. When an agency's rules no longer support the goals that they were first intended to

implement, it is the agency's duty to terminate or modify those rules.[5/]

Having conceded that any original basis for Section 90.603(c) has been rendered obsolete, the Commission purports to find a new basis for the rule in "recent trends" it claims to see regarding competition in the SMR industry. Order at ¶ 4. But it cannot determine on the one hand that its rulemaking record is so inadequate that the proceeding must be aborted in mid-course, while on the other hand making findings. This is particularly true where, as here, the new findings directly contradict the Commission's conclusion in the Notice that competition would be enhanced by repealing Section 90.603(c). Notice at ¶ 6. Either the record is sufficient to act and make findings, or it is not. The Commission's attempt to have it both ways is patently arbitrary and capricious.

The Commission's findings of purported SMR industry "trends" to justify retaining Section 90.603(c) are not only bereft of record support, but are also contradictory. It asserts that "the industry has experienced tremendous growth . . . in the number of SMR licensees", but then claims that "the industry has experienced a recent trend toward consolidation." Order at ¶ 4. Similarly, the Commission inconsistently voices concerns about competition but conversely notes the entrance of numerous "viable" competitors and the growing presence of private SMR carriers. Its conclusion

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5/ Cf. Meredith Corp. v. FCC, 809 F.2d 863, 873 (D.C. Cir. 1987) (the ordinary presumption that a rule remains valid does not apply where "the Commission itself has already largely undermined the legitimacy of its own rule.").

that retaining Section 90.603(c) would somehow preserve "recent trends" is also flawed because there is nothing in the record either as to these trends or as to how they have resulted from the rule. There is in short no showing (and no record which could support such a showing) as to why those trends justify restricting wireline carriers from participating in SMR services.[6/]

The Commission's rationale is particularly hollow with regard to a telephone company's provision of SMR services outside its wireline service areas. If the record showed a basis for precluding the operation of SMR systems by wireline carriers in their service areas, the Commission could have modified Section 90.603(c) to restrict its scope accordingly.[7/] But no such record was developed. In any event, there is clearly no connection between the Commission's speculative statements in the Order about wireline ownership of SMR systems, and preventing wirelines from providing competitive SMR systems outside their service areas.

In sum, having tentatively concluded in the Notice that Section 90.603(c) was not in the public interest, it is arbitrary for

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6/ In fact, were the Commission willing to take the steps necessary to permit a full record to develop, it would show a trend toward consolidation in the SMR industry among private carriers, not telephone companies. In addition to the record evidence of pro-competitive effects of telephone company involvement, this trend further confirms that such involvement could intensify competition to the benefit of the public. But in any event, the Commission cannot simply decline to act, having undercut the validity of Section 90.603(c).

7/ Even this action would be questionable, given that the sole concern the Commission raised about this development -- wireline carriers impeding SMR competitors from interconnection -- is already precluded by the Commission's existing interconnection policies.

the Commission to leave the rule in place without a reasoned determination based on the record as to why this conclusion is no longer true. The Order fails to provide a rational record basis for retaining the rule.[8/]

IV. THE DECISION TO TERMINATE THE RULEMAKING RATHER THAN ACCEPT FURTHER COMMENTS WAS ALSO UNLAWFUL.

The Commission's decision to end the proceeding, instead of at the least reopening it for comment, is independently invalid under settled principles of administrative law. An agency's order terminating a rulemaking, like an order adopting new rules, must be based on the rulemaking record and a reasoned analysis of the relevant factors.[9/] No such analysis occurred here.

In Williams Natural Gas Co. v. FERC, 872 F.2d 438 (D.C. Cir. 1989), the Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking ("NOPR") in which it proposed to modify a natural gas pricing rule it tentatively concluded was invalid. After accepting public comments, and waiting four years to act, FERC terminated the rulemaking. The D.C. Circuit held that FERC

8/ In this connection, it should be noted that the Commission has begun a separate new rulemaking that presents issues as to wireline involvement in radio telecommunications services. It is requesting comments there in order to develop a record so that it can then address those issues.

9/ See, e.g., Action for Children's Television v. FCC, 564 F.2d 458, 478-79 (D.C. Cir. 1977) (termination of rulemaking will be upheld if it "is blessed with an articulated justification that makes a 'rational connection between the facts found and the choice made,' and follows upon a 'hard look' by the agency at the relevant issues"); Geller v. FCC, 610 F.2d

had failed to justify its action:

> [T]his is not a case in which the agency has simply ignored private parties' requests for rulemaking. Rather, the agency has called into question the propriety of its own regulation. . . .
>
> The original NOPR in no way bound the agency to promulgate a final rule if further reflection, or changed circumstances, convinced the Commission that no regulatory change was warranted. Issuance of the NOPR did, however, oblige the agency to consider the comments it received and to articulate a reasoned explanation for its decision. We do not believe that the Commission has met these requirements.

872 F.2d at 445, 450.

The Commission's action in the SMR rulemaking is equally flawed. Like FERC, the Commission reached a tentative conclusion

conclusion that the rule was no longer valid. Similarly, none of the Commission's references to changes in the SMR industry bear on why the rulemaking should be terminated.

In other rulemakings where it was concerned that the record was stale, the Commission has issued a further notice of proposed rulemaking to obtain a more current record. See, e.g., Amendment of Section 73.658(i) of the Commission's Rules Concerning Network Representation of TV Stations in National Spot Sales, 3 FCC Rcd. 2746 (1988). To the extent the Commission believed the record was old or otherwise inadequate to support terminating or modifying the rule, it should have requested additional comments. But, having conceded that the rule was of doubtful validity, its decision summarily to terminate the proceeding, particularly without a record basis for doing so, was arbitrary and improper agency action.

V. CONCLUSION

For the above reasons, BAEI requests that the Commission reopen the rulemaking and accept new comments proposing existing